IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1634 OF 2003
IN
SUIT NO.1557 OF 2003

M/s. Radio Restaurant & Ors. ...Plaintiffs
Vs.
Abdul Wahid Gulam Rasul & Ors. ...Defendants

Mr. D.H.Mehta, Sr. Counsel with Mr. P.M. Shah i/b. Mr. L.N. Patil for Plaintiffs
Mr. E.P.Bharucha, Sr. Counsel i/b. Mr. P.K.Vyas for Defendants

CORAM: SMT.R.S.DALVI,J.
DATED: 5TH AUGUST, 2005

P.C.

1. The Plaintiffs 2 and 3 claim to be the only partners of Plaintiff No.1 firm. Plaintiff No.2 claims to be a co-owner with others and accordingly claims title in respect of the suit premises in which the business of Plaintiff No.1 is run. The Defendants are the heirs of the deceased partner of Plaintiffs 2 and 3 who expired on 26th August 2002.

2. Plaintiffs 2 and 3 and the father of the Defendants (the deceased) entered into several partnership deeds from time to time. The first of such partnership deeds was executed on 1st July 1970. Another partnership deed came to be executed on 15th March 1975. The last partnership deed between the Plaintiffs 2 and 3 and the deceased was executed on

10th July 1992. The said partnership deed is annexed at Exhibit-A to the plaint. Under the said deed of partnership the parties were to conduct the business of Plaintiff No.1. Plaintiffs 2 and 3 together had 88% share in the profits and losses. The deceased had 12% share. Under clause 15 of the said deed of partnership the firm was to continue after the death of any partner with or without taking the heir or heirs of the deceased partner as their partner. The deceased having expired Plaintiffs 2 and 3 have chosen not to take the Defendants who are heirs of the deceased as partner to the business.

3. Implicit in the said clause is the fact that if the heirs of the deceased partner are not taken in partnership the share of the deceased in the profits or losses as well as in the assets of the firm would have to be paid to them. The Defendants have not claimed any such share and Plaintiffs 2 and 3 have not offered any such share to the extent of 12% in the profit or losses or in the assets of the firm.

4. The said deed of partnership recites that an agreement for conducting was earlier entered into prior to 31st March 1992 which came to an end on the eve of 31st March 1992. The Defendants have produced, and the Plaintiffs do not dispute, that conducting agreement. It is an agreement for conducting the business of running a restaurant dated 15th March 1975

entered into between Plaintiff Nos.2 and 3 and the deceased under which the deceased was to conduct the business. Under the said conducting agreement the deceased was to receive initially 25% of the profits. In view of the earlier partnership deeds between the parties the share of profits or losses would be determined after considering and paying off the 25% agreed profits to the deceased as the conductor.

5. It is the Defendants' case that they actually conducted the business and/or together with their father and have continued to do so until the filing of the suit. It is the Plaintiffs' case that the conducting agreement dated 15th March 1975 came to an end on the eve of 31st March 1992. About 4 months thereafter the deed of partnership Exhibit-A to the plaint came to be executed.

6. Consequently the Plaintiffs claim that the Defendants discontinued to be in any actual possession as conductor or as sons of the conductor under the said conducting agreement. They claim that the partnership firm of Plaintiff No.1 itself was carrying out its business of running the restaurant from 31st March, 1992. The Plaintiffs accordingly claim to be continuously in actual possession of the suit premises from that date.

7. Abandonment of any possession has to be

clearly shown. It cannot be presumed. The agreement of conducting is admitted. Hence, the fact that the deceased was the conductor is admitted. His possession in his capacity as a conductor is also therefore admitted. There is no evidence to show that his possession in the suit premises as conductor discontinued from 31st March 1992 or from 10th July, 1992, the date of execution of the deed of partnership Exhibit-A to the plaint. The Plaintiffs have sought to show that fact merely from second recital to the deed of partnership.

8. The Defendants have admitted that the change in the firm did take place in 1992. They contend that that was because of the change in the Income Tax Law. The income tax returns of the firm accordingly show a change. The returns of the year ended in 1991 show royalty paid to the three partners of the firm including the deceased. The Plaintiffs contend that the further returns do not show that fact. No constitutional change of the firm is shown. The partners remained the same, only the conducting agreement is shown to have been discontinued. The actual discontinuance of the business by the Conductor and/or his sons is not shown.

9. That, however, is not the intrinsic evidence of the actual possession. It does not show the discontinuance of the actual possession of the

deceased and/or the Defendants as his sons, or the commencement of actual possession by the partners of the firm including the deceased in another capacity. It does not show the shift in the actual carrying on of the business.

10. The Plaintiffs have sought to show that the Defendants were only employees of the firm. They have relied upon Form No.23 of the Employees Provident Fund Scheme 1952 showing Provident Fund amount paid to Defendants 1 and 2 in the financial year 2000-2001. The Defendants do not dispute this position. They claim to be not only conductors claiming 25% of the initial profits of the business but also the Employees of the firm and members of the Employees Provident Fund Scheme and having been paid provident fund.

11. The Plaintiffs have relied upon the written complaint made by the deceased against the Defendants, his own sons, showing certain acts of mischief by the Defendants as Exhibit-C to the plaint. The Defendants are referred to as the servants of the firm therein. The Plaintiffs therefore, claim that the Defendants cannot claim to be in actual possession of the suit premises as conductors.

12. The complaint itself shows that the Defendants sought to carry on certain business and created mischief thereby. The Defendants as the sons of the

deceased came to be in charge of carrying on the business. The Defendants have thus sought to show actual possession in the suit premises, their position being shown also as employees of the firm notwithstanding.

13. The Plaintiffs claim to have closed their business on 2nd May 2003. The averment in para 4 of the plaint shows that since the Plaintiffs closed down their business, the Defendants are coming to restrain them and are creating trouble. Paragraph 4 further shows that the Defendants were only employees during the life time of the father and that they have no right under the partnership deed between Plaintiffs 2 and 3 and the deceased.

14. There appears to have been disputes between the parties pursuant to which a criminal complaint came to be lodged on 14th June 2003. Pursuant to the FIR dated 14th June 2003 certain statements were recorded by M.R. A.Marg Police station, Mumbai. The statement of Defendant No.2 shows that he was conducting the hotel business for the last 30 years and that it was the partnership business since 1975 having three partners being Plaintiffs 2 and 3 and his father and that after his father expired he along with his two brothers (who are defendants 1 and 3) ran and conducted the said business and that Plaintiffs 2 and 3 never attended the hotel. His statement further

shows that the profits were distributed between the partners after deducting 25% conducting charges of his father, the deceased. He claimed that his father's due share was 37% of the profits.

15. In that statement he has stated that on 2nd May 2003 some unknown persons entered the hotel sought to close it, removed certain valuable documents and otherwise created mischief.

16. He has stated that those unknown persons sought to dispossess them without their consent. He claims to have resisted such force with the help of police. His statement further shows that under such circumstances, certain employees who were taken to the terrace and to whom certain payments were made, also came back to the restaurant. The Defendants claim continuance of their actual possession by resisting the forcible dispossession on 2nd May 2003.

17. The Plaintiffs have relied upon this very statement to show that the Defendants were dispossessed on 2nd May 2003 so that the Plaintiffs claim to be in actual possession of the suit premises from that day and accordingly were in actual possession on the date of the filing of the suit. The Plaintiffs' Advocate contends that even if possession is taken forcibly, until the Defendants adopt due legal process, they cannot enter upon the suit

premises. The Defendants contend that they having successfully resisted the force, continued in actual possession and hence, cannot be injuncted from entering upon the such premises, since they were in actual possession on the date of the suit.

18. The report of the Court Commissioner appointed after the filing of the suit records the presence of the Defendants in the suit premises. The aforesaid documents are annexed to the report as having been produced by the Defendants before the Commissioner.

19. Prayer (a) of the plaint is not for declaration that the Plaintiffs are in actual possession. The Plaintiffs have not shown by independent evidence their actual possession of the suit premises by carrying on the business of the first Plaintiff firm. The Plaintiffs claim relief in prayer (a) which is injuncting Defendants from entering upon or remaining upon the suit premises as the owners of the suit restaurant. The Plaintiffs are not the owners of the suit restaurant. Plaintiff No.2 is the co-owner with others. Plaintiff No.1 is in fact the tenant of Plaintiff No.2 and others. The Plaintiffs have relied upon the rent receipt showing the first Plaintiff firm as the tenant of shop No.1. The rent receipt is issued by Plaintiff No.2 and his other co-owners. Therefore, the basic claim of the Plaintiffs of ownership is not seen. Though the suit

is filed on title, the title of the first Plaintiff is not shown. Since the Plaintiffs have not shown that they are in actual possession of the suit restaurant, they cannot get the injunction pending the suit restraining the Defendants' entry in the suit premises.

20. I may mention that had the Plaintiffs sued for recovery of possession of the suit premises from the Defendants who continue to carry on the business of Plaintiff No.1 firm, even after the death of their father who was the conductor, the Defendants would not be able to show any defence. They themselves claim to be conducting the business under the Conducting Agreement dated 15th March, 1975. In that agreement, the partners of the first Plaintiff firm appointed the Conductor. That agreement can therefore be terminated by the partners. This suit is not filed for any such relief. It is not filed for recovery of possession. In the suit as filed the Plaintiffs are not entitled to the relief claimed. Hence, the Notice of Motion is dismissed. No order as to costs.

21. However, it is seen that this is a fit case for disposal by the alternative method of dispute Resolution. The parties agree that the suit be referred to Mediation of Justice Mrs. K.K. Balm (retired) who will help the parties, create options to settle all the disputes between them relating to their

business as well as the suit premises, independent of their legal rights and any orders passed in this suit.

22. The Parties shall appear before the Mediator within 3 weeks from today with prior appointment. Parties agree to pay the fee of the Mediator in advance.

(SMT.R.S.DALVI,J.)